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No. 87-1552

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

PETER STEFANOU,
Petitioner,

v.

NORTH RIVER INSURANCE COMPANY, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

In its Brief in Opposition ("Opp."), North River makes no claim that Stefanou acted in bad faith in asserting his Fifth Amendment privilege in response to North River's complaint. And North River does not deny that answers to the key substantive allegations in its complaint could have tended to incriminate Stefanou.[1] On this much the parties appear to agree.

In other respects, however, North River's brief is wide of the mark. North River misses the point in arguing that *Garner* v. *United States*, 424 U.S. 648 (1976), can

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[1] Significantly, North River's list of assertedly unincriminating allegations does not include any of the crucial allegations concerning Stefanou's alleged dealings with Markowitz that formed the heart of North River's complaint. Opp. 3 n.2; App. 31a-34a, 40a-41a.

be distinguished because it involved a criminal prosecution where willfulness was an essential element of the offense. Opp. 6 & n.3. The Court should grant certiorari precisely *because* it left open in *Garner* the significant issue that this case presents: whether a civil defendant who invokes the privilege too broadly in good faith may have judgment rendered against him without an opportunity to replead.

North River errs in citing *Garner* for the proposition that "in situations other than a § 7203 prosecution, a mere erroneous assertion of the privilege warrants a sanction." Opp. 7 n.3 (citing *Garner*, 424 U.S. at 663 n.18). *Garner* noted that "a witness who risks contempt to challenge a judicial order to disclose" faces an immediate sanction if his challenge is unsuccessful. 424 U.S. at 663 n.18. As *Garner* pointed out, however, the witness who asserts the privilege "receives a judicial ruling at that time on the validity of his claim, *and he has an opportunity to reconsider it before being held in contempt for refusal to answer.*" *Id.* at 663 (emphasis added).

The district court entered judgment against Stefanou without a finding of willfulness or bad faith, and without providing him "a judicial ruling [and] an opportunity to reconsider" his assertion of privilege. Thus, Stefanou did not receive the protection afforded either to the taxpayer who asserts the privilege in good faith on his tax return, or to the witness who asserts the privilege in court. Whether a civil defendant may be penalized for invoking the privilege too broadly without *either* a showing of bad faith *or* an opportunity to replead is the question this Court should grant certiorari to decide.

North River emphasizes repeatedly that Stefanou did not formally move to amend his answer after the district court had entered judgment against him. Opp. 4, 5, 8, 9 n.5. But Stefanou did not move to amend because the district court—contrary to its duty under *Hoffman* v. *United States*, 341 U.S. 479, 486 (1951)—refused to rule

as to which of North River's allegations could tend to incriminate Stefanou and which could not.

Rather than moving to amend without knowing what the amendment would entail, Stefanou declared to the district court that he "stands ready to amend his Answer, invoking the privilege where the Court deems appropriate and responding where the Court finds (1) that the response could not possibly tend to incriminate him, and (2) that the response would not waive Mr. Stefanou's privilege." C.A. 146. The district court never made the requested ruling, and Stefanou was therefore unable to amend. Contrary to North River's assertion, Opp. 8, "[w]hether Stefanou should have been permitted to replead" clearly *is* an issue before this Court, as it was before the district court and the court of appeals.

Finally, North River's attempt to distinguish *Rogers* v. *Webster*, 776 F.2d 607 (6th Cir. 1985), and *National Acceptance Co.* v. *Bathalter*, 705 F.2d 924 (7th Cir. 1983), Opp. 9-11, simply ignores the key language in those opinions. As Stefanou pointed out in his Petition, Pet. 10, both cases approved methods of asserting the Fifth Amendment privilege virtually identical to Stefanou's. *See Rogers*, 776 F.2d at 611 n.4; *Bathalter*, 705 F.2d at 927 n.5. The decisions of the Sixth and Seventh Circuits conflict squarely with the decision of the Fourth Circuit below.[2]

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[2] North River's claim that the judgment of the court of appeals can be upheld on the basis of Stefanou's allegedly untimely assertion of the privilege in response to North River's requests for admissions, Opp. 11 n.7, borders on the frivolous. The magistrate below deemed the requests admitted on the mistaken belief that Stefanou had not filed *any* response at all. This was simply an oversight by the magistrate, as North River acknowledged in the district court; in fact, Stefanou filed a response asserting his Fifth Amendment privilege. On motion for reconsideration before the district court, North River sought to sustain the magistrate's ruling on the ground that Stefanou had waived his privilege by asserting it after the 15-day limit for discovery objections imposed by local rule. The district court refused to review the magistrate's

CONCLUSION

For the foregoing reasons, petitioner respectfully submits that the petition for writ of certiorari should be granted.

Respectfully submitted,

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ruling on the ground that it was moot, C.A. 197, and the court of appeals did not reach the issue.

North River's waiver claim provides no basis for denying the petition for certiorari. As the magistrate concluded in deciding another motion in this case, the local rule does not preclude assertions of privilege made after the 15-day limit. In any event, as Judge Hall noted in dissent in the court of appeals, the proper course would be a remand to the district court "to decide if Stefanou's response to the request for admissions was timely filed." App. 7a.